INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Coe v. *Errol*, 116 U. S. 517	7
Friedman v. *United States*, 233 Fed. 429, certiorari denied, 244 U. S. 657	6, 8
Hammer v. *Dagenhart*, 247 U. S. 251	7
Hughes Bros. Co. v. *Minnesota*, 272 U. S. 469	6
Marifian v. *United States*, 82 F. 2d 628, certiorari denied, 298 U. S. 686	6, 8
Sharp v. *United States*, 280 Fed. 86	7, 8
United States v. *Darby*, 312 U. S. 100	7
United States v. *De Normand*, 149 F. 2d 622, certiorari denied, 326 U. S. 756	6
United States v. *Fox*, 126 F. 2d 237	6, 7, 8
United States v. *Sheffield Farms Co.*, 43 F. Supp. 1	7
Wolk v. *United States*, 94 F. 2d 310	7

Statute:

Act of February 13, 1913, c. 50, 37 Stat. 670, as amended, 43 Stat. 793, 47 Stat. 773, 18 U. S. C. 409	2

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 89–96) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 11, 1948 (R. 97). The petition for a writ of certiorari was filed March 11, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, on the undisputed evidence, the trial court should have ruled as a matter of law that the goods which petitioners were charged with having stolen and received were not "goods or chattels moving as or which are a part of or which constitute an interstate * * * shipment of freight or express," within the purview of 18 U. S. C. 409.

STATUTE INVOLVED

The Act of February 13, 1913, c. 50, 37 Stat. 670, as amended, 43 Stat. 793, 47 Stat. 773 (18 U. S. C. 409), provided in pertinent part at the time of the offenses in question here:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *. The words "station house," "platform," "depot," "wagon," "automobile," "truck," or "other vehicle," as used in this section, shall include any station house, platform,

depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

STATEMENT

An indictment in two counts was returned against petitioners in the District Court for the District of New Jersey charging violations of 18 U. S. C. 409 (R. 3–5). The first count charged the theft of 600 cases of beer which "were moving as, formed a part of and constituted an interstate shipment of freight, in the course of shipment in interstate commerce." The second count charged petitioners with receiving and having the beer in their possession, knowing it to have been stolen.

So far as here relevant, the undisputed evidence presented by the Government showed the following facts:

About 1:00 A. M. on June 15, 1946 (R. 9, 15), 600 cases of beer were loaded on a truck belonging to P. Ballantine & Sons, a brewery (R. 50), at the loading platform on the company's premises in Newark, New Jersey (R. 10). After the truck was loaded, its door was closed and sealed (R. 11). Previously, a bill of lading had been prepared covering this prepaid shipment from Ballantine to Charles Luberger at North Tarrytown, New York (R. 11, 79), and in accordance with Ballan-

tine's usual practice, drivers had been assigned to make this particular trip (R. 54). After the truck was loaded and sealed, the witness Borowsky, one of Ballantine's employees, drove it from the loading platform to a street two blocks away, where he parked it opposite the company's garage (R. 12). He then took the bill of lading and the key for the truck into the garage and hung them on a nail there (R. 12), to be picked up later by the drivers assigned to make the trip (R. 16).

About 2:00 o'clock the same morning (R. 14), Borowsky observed that the truck had disappeared from the place where he had parked it and that the key and bill of lading were still in the garage where he had left them (R. 13). The truck was recovered by the Newark police at 4:20 a. m. the same day; the seal was broken, the doors open, and the truck empty (R. 21).

At the close of the Government's case, petitioners moved for directed verdicts of acquittal for insufficiency of the evidence; the motions were denied (R. 63–64). The court charged the jury that, as a matter of law, on the undisputed evidence adduced, the beer was in interstate commerce at the time of the theft (R. 71–72). The jury returned verdicts of guilty against both petitioners on each count (R. 76). Thereafter, petitioners renewed their motion for a judgment of acquittal, one of the grounds of the motion being (R. 83–84):

> That the Court is without jurisdiction in this case, the Government having failed to prove that the goods referred to in the indictment * * * were moving in interstate commerce at the time the alleged offenses occurred.

This motion was also denied (R. 2).

Each of the petitioners was sentenced to imprisonment for two years on the first count and one year on the second, to run consecutively (see R. 2, 85–87).

On appeal, the circuit court of appeals held that it was error for the trial court to instruct the jury that, as a matter of law, the beer was in interstate commerce at the time of the theft, since it was within the province of the jury to pass on the credibility of the witnesses and they might have disbelieved the uncontradicted testimony as to the loading and movement of the truck (R. 92–96). Accordingly, the judgments were reversed and the cause remanded for a new trial (R. 97). However, the circuit court of appeals upheld the district court's action in denying petitioners' motions for judgments of acquittal, holding that the evidence, if believed, established that the beer was in interstate commerce when it was stolen (R. 92, 93). It is this action which petitioners seek to have reviewed by this Court.

ARGUMENT

We submit that under well established precedents, the undisputed evidence in this case estab-

lishes that the beer was in interstate commerce at the time of the theft. The court below has cogently set forth the controlling considerations and authorities (R. 90–92). In effect, what happened here was that P. Ballantine & Sons transferred the goods from itself as shipper to itself as interstate carrier under a through bill of lading. The transfer was completed, at the latest, upon the sealing of the truck, with the bill of lading prepared and all arrangements completed for the physical transportation. Had the truck belonged to an independent carrier, either an interstate carrier (see *United States* v. *De Normand,* 149 F. 2d 622, 624 (C. C. A. 2), certiorari denied, 326 U. S. 756), or an intrastate transfer company (*United States* v. *Fox,* 126 F. 2d 237 (C. C. A. 2)), there could be no possible question that the interstate shipment had commenced. And it is equally clear from the definitions contained in the last sentence of the statute quoted above (pp. 2–3) that the result is not affected by the fact that the carriage is by the owner of the property. *Friedman* v. *United States,* 233 Fed. 429 (C. C. A. 1), certiorari denied, 244 U. S. 657; *Marifian* v. *United States,* 82 F. 2d 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686. The shipment having commenced, the fact that it was somewhat delayed thereafter did not remove it from interstate commerce. *Hughes Bros. Co.* v. *Minnesota,* 272

U. S. 469; *United States* v. *Sheffield Farms Co.*, 43 F. Supp. 1, 5 (S. D. N. Y.).

Apart from the fact that *Hammer* v. *Dagenhart*, 247 U. S. 251, upon which petitioner relies (Pet. 6), has been overruled (*United States* v. *Darby*, 312 U. S. 100, 115–117), that case involved no question as to the point when interstate commerce commences. *Coe* v. *Errol*, 116 U. S. 517 (see Pet. 6), is also inapposite; it involved only a question of the validity of a state tax imposed upon property intended for export to another state and partially prepared for that purpose (Pet. 6). In the present case the beer had been "actually started in the course of transportation to another State, or delivered to a carrier for such transportation" (116 U. S. at 525).

Nor, clearly, is the decision below on this point in conflict with *Wolk* v. *United States*, 94 F. 2d 310 (C. C. A. 8), *United States* v. *Fox*, *supra*, or *Sharp* v. *United States*, 280 Fed. 86 (C. C. A. 5), as petitioner contends (Pet. 6–7). In the *Wolk* case it was held that goods had been started on their interstate shipment at least when they were delivered on a through bill of lading to a local, intrastate shipper for transfer to an interstate carrier. Similarly in the *Fox* case, the court held that interstate shipment begins "at least as soon as the goods have finally left the shipper's possession and have come into the possession of any of those who are to forward

them upon an interstate journey, intended to be such from the outset" (126 F. 2d at 238). The *Sharp* case is to similar effect. Petitioners' statement (Pet. 7) that under these cases "interstate commerce began *only* after the goods had left the premises and possession of the shipper" (italics supplied) is clearly erroneous. To adopt this view would remove from the scope of the statute all cases in which the stolen property belongs to the carrier. But, as noted above, this contention has been rejected by the courts. *Friedman* v. *United States, Marifian* v. *United States, supra.*

CONCLUSION

The decision of the court below on the issue here raised is clearly correct. The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPHINE H. KLEIN,
Attorneys.

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